

## ***8 Official Opinions of the Compliance Board 19 (2012)***

- ◆ Open Session Requirement
    - ◇ Practices in violation, charging admission
  - ◆ Meeting
    - ◇ Determined to be a meeting: convening of quorum at event initiated and sponsored by the public body to discuss public business
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January 30, 2012

***Re: Carroll County Commissioners (Cornelius M. Ridgely, Complainant)***

We have considered the complaint of Cornelius M. Ridgely (“Complainant”) that the Board of Carroll County Commissioners (“County Board”) violated the Open Meetings Act (the “Act”) by charging admission to an event attended by a quorum of that public body. We have also considered the County Board’s response to the complaint. For the reasons stated below, we conclude that the County Board violated the Act.

### **I**

#### **Facts and Allegations**

In April, 2011, the Maryland Department of Planning (“MDP”) issued a draft statewide land planning document titled “PlanMaryland.” The County Board held public meetings and submitted comments on that draft. In September, 2011, MDP issued a revised draft. On October 31, 2011, the County Board held an event named “PlanMaryland: At the Crossroads” (“the forum”). The County Board states that it had “initiated and co-sponsored” the event as a “public forum on the scientific assumptions behind PlanMaryland for county and municipal officials and planners from throughout the State.” The County further states: “Other interested individuals who attended were charged \$25.00 for admission....” The event was held at a hotel in Baltimore County.

Three members of the five-member County Board attended. Presentations were made by speakers from various organizations, states, and countries and by one of the commissioners. A second commissioner served as moderator. The third is listed on the agenda with the first commissioner for the item titled “Closing Remarks and Action Plan” but apparently did not speak. The County Board states that the three members sat separately and did not interact among themselves during the presentations.

On the day after the forum, the County Board posted a videotape of the event. It later posted the materials presented by the speakers.

A week later, on November 8, 2011, the County Board submitted another set of comments on PlanMaryland to the State. In those comments, the County Board stated, in relevant part:

We are writing once again to formally request an extension of time for input, discussion, debate and collaborative work on Plan Maryland prior to it being enacted. Surely by now it is clear that we have many concerns about the Plan and its long-range implications for Carroll County and other rural areas. Since Plan Maryland was released, Carroll County Commissioners have made a great effort to engage in respectful, thoughtful and informed debate on the substance of the plan, not the politics. ...

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Our recent Plan Maryland: At the Crossroads Forum, attended by representatives of 18 counties and the City of Baltimore, presented credible information that refutes many of the premises on which the plan is based with regards to the use of automobiles, mass transit, septic systems, and other environmental concerns (please see presentations enclosed). There is still much more to understand, discuss and debate. Therefore, we are seeking more time to work collaboratively with your office ....

(available at <http://plan.maryland.gov/draftPlan/publicCommentsRevisedDraft.shtml>).

Complainant alleges that the County Board violated the Act when a quorum of its members met to discuss public business in a meeting not open

to the public. A meeting is not “open,” the Complainant states, when a person must pay to attend.<sup>1</sup>

The Deputy County Attorney, responding for the County Board, argues that the forum was not a “meeting” as defined by the Act. She asserts that “[i]n order to function as a quorum, County business must be discussed and voted on” and that the “Commissioners that attended the forum were there as individuals and not as a decision-making body engaged in the conduct of public business.” She states, “the Commissioners did not discuss nor vote on County business” and “did not sit or act as a decision-making body and therefore a meeting did not take place....”

The Deputy County Attorney further states that the “[County Board’s] opposition to Plan Maryland had been announced prior to the forum, so this event cannot be characterized as a pre-decisional information briefing or information gathering session.” She states, “Rather, it was an effort to mobilize other governmental entities and State officials to oppose Plan Maryland.”

## **II**

### **Discussion**

The complaint and response raise two issues: whether the forum fell within the category of meetings which the Act requires a public body to open to the public, and, if so, whether the County Board met that requirement.

#### *A. Whether the Act required the County Board to open the forum to the public*

The Open Meetings Act provides, “Except as otherwise expressly provided in this subtitle, a public body shall meet in open session.” State Government Article (“SG”), §10-505. “Meet,” under the Act, “means to convene a quorum of a public body for the consideration or transaction of public business.” SG §10-502 (g). An entity’s gathering thus is subject to the SG §10-505 openness mandate if five elements are met: (1) the entity is a “public body”; (2) a quorum of its members is present; (3) the topic discussed is “public business”; (4) the gathering is convened for the “consideration or transaction” of that business; and (5) no provision of the Act excludes it from that mandate.

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<sup>1</sup> Complainant also states that the County charges for copies of videotapes of its meetings. The Act entitles a person to inspect minutes at the public body’s office, but it does not require a public body to provide copies at no charge.

Four of the five elements require little discussion. The County Board is a “public body” as SG § 10-502 (h)(1) defines that term, because it is a multi-member entity “created by ... a State statute ....” *See* Maryland Code, Art. 25, § 1-1 (declaring the “county commissioners” to be a “corporation” with certain powers). A “quorum” of the members of that public body attended the forum; according to the County Board, three of its five members were present, and that number constitutes a quorum. The business of the forum, an assessment of the then-current PlanMaryland draft, was the “public business” of the County. That result follows from the County Board’s statement to us that it had held “numerous public meetings” to discuss an earlier PlanMaryland draft and from its decisions to submit two sets of comments to MDP, among other facts.<sup>2</sup> None of the express exceptions or exclusions applies; the County Board has not claimed that the Act expressly provided authority for closing the forum to the general public.

We are therefore left with one question: did the County Board convene for the “consideration or transaction” of the public business discussed at the forum?

We begin with the County Board’s legal proposition that, for a meeting to occur, “County business must be discussed and voted on....” The “voted on” part of that proposition is incorrect. The Act applies when a quorum of a public body meets for the “consideration *or* transaction of public business,” *see* SG § 10-502 (g) (emphasis added), whether or not the public body votes. Indeed, the General Assembly stated, as the legislative policy to be implemented by the Act, that “[i]t is essential to the maintenance of a democratic society that, except in special and appropriate circumstances ... citizens be allowed to observe .... the deliberations and decisions that the making of public policy involves.” SG § 10-501(a). The General Assembly also emphasized that the “accountability of government to the citizens of the State” is ensured by their ability “to witness the phases of the deliberation, policy formation, and decision making of public bodies....” SG § 10-501(b). And, in *Board of County Commissioners of Carroll County v. Landmark Community Newspapers*, 293 Md. 595, 446 A.2d 63 (1982), the Court of Appeals explained:

It is ... the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business.

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<sup>2</sup> The County Board does not claim that the forum wholly concerned the business of some other entity.

293 Md. at 601 (quoting *City of New Carrollton v. Rogers*, 287 Md. 56, 410 A.2d 1070 (1980)). In accordance with this law, we have long considered all of the phases of a public body's formation of policy – “every step of the process” – to be subject to the Act. See, e.g., 1 *OMCB Opinions* 23, 27 (1993) (stating that “information-gathering at the earliest stages of policy formation is part of the ‘consideration ... of public business’”); see also 6 *OMCB Opinions* 155, 160 (2009) (stating that “preliminary discussions” of a topic on which the public body would later act “even if limited in scope and devoid of comments by some... members there solely for informational purposes, [were] subject to the Act”).

Here, the information gathered by the County Board at the forum was later reflected in its November 8, 2011 comments to the State: in those comments, the County Board stated that “credible information” presented at its forum merited an extension of the comment period, and it referred to “presentations enclosed.” We find that the presentation of information at the forum was a step in the process of the County Board's continuing formation of its response to the then-current draft of PlanMaryland.

We turn next to whether, on the facts of this matter, the County Board “considered” the public business discussed at the forum. In support of its assertion that its members did not “sit or act as a decision-making body,” the County Board states that the members attended “as individuals,” that they did not sit together, and that only two members spoke. The County Board cites *Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157 (1994). There, the Court of Special Appeals held that the Act had not been violated by the presence of a quorum of a county council at an event, even though one member was called on to summarize a matter that would come before the council. The event, however, had not been initiated by the council. Instead, a party central committee had initiated and held it for the purpose of discussing party business. A committee member, not a council member, had asked for the summary, and no council member expressed individual preferences on the matter. *Id.* at 675. The appellate court therefore distinguished the case from out-of-state cases in which the meeting was initiated by the public officials themselves to consider public business. *Id.* at 679-80.

Consistently with *Ajamian*, our inquiry into whether a public body has “considered” its business has focused on whether, even at events organized by other entities, a quorum of members either were provided the opportunity to deliberate on the public body's own business or used the event for that purpose. In 1 *OMCB Opinions* 206 (1997), for instance, a county council attended a school board meeting as invitees, but were given the opportunity to comment and ask questions on matters that would come before the council. Finding that the council members “were not mere spectators, as if they were

in the audience at a lecture,” we concluded that they had “met” for purposes of the Act. *Id.* at 208-09. And, in 2 *OMCB Opinions* 5 (1998), we addressed a gathering held jointly by two county councils. We concluded that the public bodies had in fact conducted public business because the meeting, during which the two bodies listened to a presentation by a county council member and selected a committee, presented “an opportunity for interchange among quorums of the two bodies.” 2 *OMCB Opinions* at 8. On the other hand, we concluded that the presence of a quorum of a municipal public body at a Chamber of Commerce dinner, an event which had been requested by the Lieutenant Governor and moderated by the local Chamber president, did not turn that event into a “meeting” subject to the Act. 3 *OMCB Opinions* 310, 312 (2003). We explained that the presence of a quorum at another entity's event does not make the event a meeting “for the consideration or transaction of public business” unless the members “use the occasion to convene [for that purpose].” *Id.*<sup>3</sup>

Here, the County Board itself initiated the gathering. One of the three County Board members there moderated. A second member opened the forum with a PowerPoint presentation on topics such as “Key concerns about PlanMaryland,” “Where we agree with MDP,” and “Where lines are being crossed.” According to the agenda the County Board provided to us, the County Board planned to close the event with “[w]ritten questions from audience and panel discussion,” to be moderated by that second member and then “Closing Remarks and Action Plan,” to be presented by the second and third members. The forum thus was not analogous to a meeting which had been initiated and controlled by another entity to discuss that entity’s business and which had been attended passively and separately by members of a public body. *See, e.g.* 1 *OMCB Opinions* 120, 121 (1995) (concluding that the attendance of the quorums of various local election boards at the Maryland Association of Election Officials conference did not violate the Act so long as each separate board did not separately conduct its own public business). We

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<sup>3</sup> The advice letter to which Deputy County Attorney refers us, a letter written by staff for the New York Committee on Open Government, addresses a similar question arising from a Chamber of Commerce event. The writer advised that, “in some instances, the manner in which members of public bodies are situated suggests whether a meeting is being held,” and “if Board members are merely attendees, and not functioning as a body, in my view, their presence would not constitute a ‘meeting.’” State of New York Committee on Open Government OML-AO-4248 (August 24, 2006). In that context, the author hypothesized, “if one member is sitting at one table, a second member sits at a different table, and a third is situated apart from the other two, the three ... members clearly would not be functioning as a body....” Here, however, the County Board itself “initiated and co-sponsored” the gathering; one of its members moderated it; and another gave a presentation.

conclude that a quorum of the members of the County Board met at the forum for the consideration of public business and that the event was therefore subject to the Act.

We turn to the County Board's statement that only two commissioners actually spoke. That assertion raises the question of whether the Act can be interpreted to permit a public body to initiate, co-sponsor, and close a meeting at which public business is considered, so long as fewer than a quorum of members speaks. Although the vocal participation of the members of a quorum may be relevant in some circumstances, as in *Ajamian*, we have not interpreted the Act to permit a public body to close its own meeting by limiting the number of speakers to fewer than a quorum of its members. *See* 6 *OMCB Opinions* 155, 158 (2009) (concluding that a public body "met" under the Act when a quorum of its members attended a meeting of that body's subcommittee "simply to 'observe' and provided 'minimal input, if any'"). The Act does not support such an interpretation; it does not define the term "meet" in terms of actual participation, whether vocal or otherwise. Where a public body itself holds and controls a gathering, the fact that fewer than a quorum participate demonstrably is not determinative of whether the quorum has met to consider public business. Here, the County Board itself initiated the forum, one commissioner moderated it, and another addressed a topic on which the County thereafter submitted comments to the State. Again, the event was thus not analogous to an event held by an outside entity for the discussion of that entity's business and attended passively by a quorum of a public body.

We conclude that the forum was subject to the Act's openness mandate.

*B. Whether the forum was open to the public*

An "open session," we have explained, "means that members of the public are, as a practical matter, able to attend." 1 *OMCB Opinions* 44, 45 (1993). As we stated in 2 *OMCB Opinions* 67, 69 (1999), the Act "does not contain an intermediate category of 'partially open meetings,' to which some members of the public are admitted and others excluded." Here, the general public's attendance at the forum was conditioned on the receipt of an invitation or the payment of twenty-five dollars. The event thus was not an "open session." To be sure, the County Board posted an audiotape of the event and the speakers' presentations on its website shortly after the event. The Act, however, does not permit substitutes for the provision of access to the actual meeting. We therefore conclude that the County Board violated the Act by charging admission to the general public.

**III**

**Conclusion**

For the reasons given above, the County Board violated the Act by charging admission to a meeting held for the consideration of public business. We commend the County's prompt posting of materials from the event on its website. That action, however, does not serve as a substitute for compliance with the openness mandate set forth in SG §10-505.

**OPEN MEETINGS COMPLIANCE BOARD**

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